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In the Supreme Court of the United States

OCTOBER TERM 1974

NO. 74-1333

JULIAN G. CARR

Petitioner

vs.

THE UNITED STATES

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION OF THE LOWER COURT	2
CITATION TO OPINION BELOW	2
QUESTIONS PRESENTED FOR REVIEW	3 - 4
STATUTE INVOLVED	5
STATEMENT OF THE CASE	5 - 6
REASONS FOR GRANTING THE WRIT	6
STATEMENT OF THE FACTS	6 - 9
ARGUMENT	10 - 14
CONCLUSION	15
CERTIFICATE	16

APPENDIX

Page

Opinion of the United States Court of Appeals Fifth Circuit ..... App. 1 - 6

Order from United States Court of Appeals Fifth Circuit, denying Petition for Rehearing ..... App. 7

Order from United States Court of Claims ..... App. 8

Memorandum For the United States in opposition to Plaintiff's Writ of Certiorari to the United States Court of Appeals ..... App. 9- 12

Final Judgment and Order dated April 25, 1974, U.S. District Court ..... App. 12 - 16

LIST OF AUTHORITIES CITED

Case	Page
Alabama Power Co., v. Ickes, 1938, 95 F.2d 364, 68 App. D.C. 235	12
Armstrong v. Manzo, 380 U.S. 545, 552 (1965)	11
Batchelor v. Legg & Co., D.C. Md. 1972, 55 F.R.D. 557	11
Bateman v. Ford Motor Co., D.C. Mich. 1948, 76 F.Supp. 178, Certiorari denied 69 S.Ct. 405 (2), 335 U.S. 902, 93 L.Ed. 436	13
Brown v. W. T. Grant Co., D.C. N.Y. 1943, 53 F.Supp. 182	15
Carr v. United States of America, ____ F.2d ____ (5th Cir. 1975)	11
Grannis v. Ordean, 234 U.S. 385, 394 (1914)	11
Hadlich v. Americun Mail Line, 82 F.Supp. 562 (1949)	13
Heart of Atlanta Motel, Inc. v. U.S., (Ga. 1964), 85 S.Ct. 1, L.Ed.2d 12	2
Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364	12-13

LIST OF AUTHORITIES CITED (Cont.)

Case	Page
McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1410	14
Powell v. McCormack, 395 U.S. 486 (1951)	6
Stark v. Coker, 129 P.2d 390 (S.Ct. Cal. 1942)	10
Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (1971)	10
Travelers Club, Inc. v. Hostetter, D.C. N.Y. (1963) 219 F.Supp. 95	6
U.S. v. Appalachian Electric Power Co., D.C. Va. 1938, 23 F.Supp. 83, affirmed 107 F.2d 769, reversed on other grounds, 61, S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143, Petition denied, 63 S.Ct. 67, 317 U.S. 594, 87 L.Ed. 487	14
U.S. v. C. O. Mason, Inc., 1964, 51 CCPA 107, Certiorari denied, 85 S.Ct. 718, 379 U.S. 999, 13 L.Ed.2d 701	11-14
U.S. v. Kearns, 115 F.2d 552 (1940)	12

OTHER AUTHORITIES

	Page
AMENDATORY SECTION 415 to the Career Compensation Act of 1949	5
AMENDMENT 5 to the United States Constitution	3
ARTICLE 1, Clause 2, Section 7, United States Constitution	3
ARTICLE 3, Section 2, United States Constitution	2
CLAUSE 1, Amendment 14, United States Constitution	3
CLAUSE 2, Article VI., United States Constitution	4
RULE 19 1.(b) and 2. Part V, Supreme Court Rules	3
28 UNITED STATES CONSTITUTION Section 1254 (1)	3

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Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana

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Petitioner, JULIAN G. CARR, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, wherein judgment was entered in favor of the Respondent, UNITED STATES OF AMERICA, based upon the doctrines of res judicata and collateral estoppel.

OPINION OF THE LOWER COURT

The United States Court of Appeals, Fifth Circuit, in Case No. 74-2589, rendered its decision on January 24, 1975 (App. 1-6) and denied petition for re-hearing on March 6, 1975 (App. 7).

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at _____ F.2d _____ (5th Cir. 1975). The opinion is set forth in its entirety in the Appendix hereto. (App. 1-6)

JURISDICTION

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, was rendered on January 24, 1975. The Fifth Circuit denied the Petition for Rehearing on March 8, 1975. (App. 7)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254 (1), Article 3, Section 2 of the United States Constitution, Rule 19 1. (b) and 2., Part V. of the Supreme Court Rules, and under the decision in *Heart of Atlanta Motel, Inc., v. U.S.*, (Ga. 1964), 85 S.Ct. 1, L.Ed.2d 12. Petitioner has been deprived of his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and has further been subjected to an ex post facto application of the law prohibited by Article One, Section Nine of the United States Constitution.

The opinion and judgment from which this review is sought has decided an important question of Federal law which has not been, but should be settled by this Court. Moreover, it has decided a federal question in a way in conflict with applicable decisions of this court and has departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's Power to determine the constitutional issues herein presented.

QUESTIONS PRESENTED FOR REVIEW

1. Do the doctrines of res judicata and collateral estoppel operate as a bar to Petitioner's right to now challenge the constitutionality of amendatory Section 415 to the Career Compensation Act of 1949, 64 Stat. 158?

2. If not, is said amendatory Section 415 unconstitutional for the following reasons?

(a) Does it violate Article 1, Clause 2, Section 7 of the United States Constitution in that the law was made to operate retroactively, thereby violating Petitioner's constitutional right to equal protection under the law?

(b) Does it violate Clause 1, Amendment 14, to the United States Constitution in that it has deprived Petitioner of the essentials of due process of law and his property rights?

(c) Does it violate Amendment 5 to the United States Constitution in that the law was made to

operate retroactively, thereby depriving Petitioner of his property, without due process of law?

(d) Does it violate Clause 1, Amendment 14, to the United States Constitution in that it has discriminated against Petitioner?

3. Is amendatory Section 415 repugnant to Clause 2, Article VI of the United States Constitution in that it is in conflict with the supreme law of the land; the Congressional intent and purpose of the Career Compensation Act of 1949, and the vested rights of Petitioner thereunder?

4. Was Petitioner's suit for Declaratory Judgment, brought in the Trial Court below, to determine the constitutionality of amendatory Section 415, barred by res judicata and collateral estoppel, *when this constitutional question was raised in the Court of Claims*, but was not ruled upon by that Court, or any other Court?

5. Was there a genuine issue of a material fact, raised in the Trial Court below, that would preclude the Trial Court from entering Summary Judgment for Respondent?

6. If amendatory Section 415 is determined to be unconstitutional by this Honorable Court, as against Petitioner, is he entitled to the relief prayed for in the Trial Court?

STATUTE INVOLVED

Amendatory Section 415 to The Career Compensation Act of 1949, 64 Stat. 158, 37 USCA 285, states:

> "Any member who, on October 1, 1949, was a hospital patient and who, prior to January 1, 1951 is retired as the result of a physical disability growing out of the injury or disease for which he was hospitalized, may elect to receive retirement benefits computed under the laws in effect on September 30, 1949."

STATEMENT OF THE CASE

On October 29, 1973, Petitioner filed suit in the United States District Court, Southern District of Florida, for Declaratory Relief from the following orders that had previously been entered against him:

(a) In the United States Court of Claims, dated June 18, 1965, granting Summary Judgment for Defendant (App. 8).

(b) In the Supreme Court of the United States, October term, 1965, granting Summary Judgment for Defendant (App. 9-10)

(c) Sub-Committee #2 of the Committee on The Judiciary, dated July 31, 1973.

Petitioner's suit for Declaratory Judgment, in the Trial Court, was authorized under Rule 57 of the Federal Rules of Civil Procedure and Section 2201, Title 28, of the United States Code; he presented a bona fide "case or

controversy" cognizable by this Court of first instance. *Powell v. McCormack*, 395 U.S. 486 (1951) see also: *American Travelers Club, Inc. v. Hostetter*, D.C., N.Y. (1963) 219 F.Supp. 95.

On January 3, 1974, Respondent filed its motion and memorandum of law to dismiss. The Trial Judge denied this motion on February 5, 1974. Thereafter Respondent filed its answer together with a motion for summary judgment and law in support thereof. Petitioner filed his affidavit in opposition to Respondent's motion for summary judgment April 12, 1974. This Cause was heard on April 15, 1974; the Trial Judge entered summary judgment for Respondent on April 25, 1974 (App. 12-16), and Petitioner's motion for a new trial was denied on May 9, 1974. On June 14, 1974, Petitioner took an appeal to the United States Court of Appeals, Fifth Circuit, being case No. 74-2589, which was placed on the Court's Summary Calendar and ruled upon January 24, 1975, followed by Respondent's petition for re-hearing on February 8, 1975, denied on March 8, 1975 (App. 7). This petition follows:

REASONS FOR GRANTING THE WRIT

Petitioner has suffered discrimination under the law, has been deprived of his property through the Ex Post Facto application of the Law, has been denied equal protection under law, and has suffered the loss of his property without due process of law.

STATEMENT OF THE FACTS

Petitioner, JULIAN G. CARR, enlisted in the United States Army on June 24, 1942. He was commissioned, as a Second Lieutenant, upon his graduation from Officer

Candidate School, January 19, 1943. Except for a 14 month period of inactive duty, he served on active duty with the Army and then the Air Force until his retirement on June 30, 1950.

During a six month tour of duty in the Phillippines and Japan in 1945, Petitioner was hospitalized for one day and treated for a severe hookworm infection. Later, after a tour of duty in the United States, he was assigned to duty in Okinawa as a Legal Assistance and Personal Affairs Officer.

On October 10, 1949, Petitioner was admitted to the 34th. General Hospital, Kadena Air Force Base, Okinawa, for treatment of infectitious hepatitis. He remained in this hospital until his transferral to Valley Forge General Hospital, Phoenixville, Pennsylvania, December 15, 1949, where he remained for approximately seven months, until his retirement.

After extensive hospitalization and treatment, a Physical Evaluation Board determined Petitioner was physically unfit to perform the duties of his office. Based upon the Board's recommendation, he was retired on June 30, 1950, under the provisions of the Career Compensation Act of 1949 (63 Stat. 802). Under this act, the Board determined that Petitioner had a permanent physical disability rated at 30 percent and was entitled to retirement pay at the rate of 30 percent of his active duty pay.

Petitioner claims, and as plead in the Trial Court below, at the time the Board made this evaluation, Respondent, through its Department of the Air Force and the Physical Evaluation Board, did not apprise Petitioner

of his rights under the Career Compensation Act of 1949; that he was summarily retired after eight years and seven days service, for basic pay purposes, with a physical disability arbitrarily set by the Board at 30 percent. Petitioner further claims he did not know about his right of election, under the Career Compensation Act of 1949, to make his Claim under the Career Compensation Act of 1861 or 1949, whichever gave him the most benefits, until he read a notice to this effect in the Disabled Officer's Association Bulletin of May 20, 1960.

After exhausting his administrative remedies in an effort to have his retirement pay adjusted from 30 percent to 75 percent, Petitioner finally brought an action in the Court of Claims (Case No. 142-64), May 22, 1964, asserting that the Career Compensation Act of 1949 gave him the right to elect to have his disability retirement pay computed on the basis of laws in effect prior to its enactment and that, therefore, he was entitled to receive retirement pay equal to 75 percent of his base pay. The Court of Claims denied Petitioner's motion for Summary Judgment and motion for Re-hearing. On June 18, 1965, Summary Judgment was entered for Respondent, concluding that Petitioner's claim did not fall within either Section 414 of the Original Career Compensation Act of 1949, or Section 415 of the Act, as amended. (App. 8).

Petitioner then petitioned the Supreme Court of the United States (Case No. 1042) for a Writ of Certiorari to the Court of Claims, but his motion for Summary Judgment was denied in October term, 1965. (App. 9-10)

In 1969, The Honorable Claude Pepper, introduced House Bill 4061 to Sub-Committee No. 2 of the Committee On The Judiciary, for it's consideration on behalf of the Petitioner. On July 31, 1973, Petitioner received final notice from the Chairman of the Sub-Committee on Claims that after consideration of the matter, the Sub-Committee concluded that it would adhere to its previous adverse action and not waive Rule 10 which it claimed had barred reconsideration of matters that were previously considered adversely by the Committee.

Petitioner's suit for Declaratory Judgment, brought in the Trial Court below, alleges the decisions of the United States Court of Claims, The United States Supreme Court, and Sub-Committee No. 2 of the Committee On The Judiciary, have not determined Petitioner's rights, or his status, under the Career Compensation Act of 1949, in that said decisions have all sought to interpret said Act with reference to the rights of Petitioner thereunder, without first determining the Constitutionality of Section 415 of the Career Compensation Act of 1949 which was amended to read, as hereinabove stated.

Accordingly, Petitioner's suit requested the Trial Court to determine amendatory Section 415 unconstitutional and void, as against Petitioner, and if found to be so, the Court would then determine Petitioner to be entitled to the difference between 75 percent of his base retirement pay, from his date of retirement to the present date, together with interest thereon, reasonable attorney's fees and the costs of this suit.

ARGUMENT

The Honorable United States Court of Appeals, for the Fifth Circuit, apparently would not consider Petitioner had previously raised the constitutionality of amendatory Section 415 in the Court of Claims, and that this Court failed to rule upon this issue. Likewise, when Petitioner's petition for Writ of Certiorari was presented to the United States Supreme Court, in October term of 1965 (Case No. 1042), no consideration was made of the constitutionality of amendatory Section 415. Petitioner therefore presents the following question: was Petitioner's suit for Declaratory Judgment, brought in the Trial Court below, to determine the constitutionality of amendatory Section 415, *as against Petitioner*, barred by res judicata or collateral estoppel, *when this constitutional question was raised in the Court of Claims*, but was not ruled upon by that Court, or any other Court? Petitioner argues not, and takes the position that the Honorable Justice, THURGOOD MARSHALL'S memorandum (App. 9-10) is not binding on this Honorable Court. *Trans World Airlines, Inc., v. Hughes*, 449 F.2d 51 (1971).

Petitioner respectfully submits that he had no other remedy but to apply to the Court of Claims for relief; that the question of the constitutionality of amendatory Section 415 was raised in the Court of Claims; that this Court and the United States Supreme Court, having failed to rule thereon, has preserved this question for Petitioner's pursuit for relief in the case at bar. *Stark v. Coker*, 129 P.2d 390 (St.Ct. Cal. 1942).

Under the Constitution of the United States, a person cannot be deprived of property without due process of law

(Amendments 5 and 14). The fundamental requisite of due process of law is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Petitioner's claim has never been tried on the merits. Instead, it has been tried strictly on principles of law, without inquiry into the facts to clarify the application of the law. *Batchelor v. Legg & Co.*, D.C. Md. 1972, 55 F.R.D. 557. Petitioner respectfully submits: the doctrine of res judicata or collateral estoppel must not be wielded as a shield or a sword to prevent or cut down Petitioner from having his day in Court, where his primary right, from the inception of his claim, is and has been different than the alleged wrong. *Carr v. United States of America.* ____ F.2d ____ (5th Cir. 1975). (App. 5-6).

The Honorable United States Court of Appeals, Fifth Circuit, has apparently failed to consider that Petitioner's conceding amendatory Section 415 unconstitutional *does not operate or mitigate to allow or permit the Court of Claims' Order (App. 8) to bar Petitioner from being entitled to make his claim under Original Section 415*, for this Original Section is *absolutely dependent* upon the application of amendatory Section 415 to bar Petitioner from making his claim thereunder, i.e., Original Section 415. *Carr v. United States, supra.* It therefore follows: the taking away of amendatory Section 415, by declaring it unconstitutional, would leave the Original Section 415 available to Petitioner, as of October 12, 1949, for him to make his claim thereunder. Further, declaring amendatory Section 415 unconstitutional would make it so ab initio, or as of May 10, 1950, the day it was passed into law. *U.S. v. C.O. Mason, Inc.*, 1964, 51 CCPA 107, Certiorari

denied 85 S.Ct. 718, 379 U.S. 999, 13 L.Ed.2d 701. Arguendo, this being so, the unconstitutionality of amendatory Section 415 would pre-date the Court of Claims' Order (App. 8) thus rendering it moot and ineffective to bar Petitioner from making his claim under Original Section 415. *U.S. v. Kearns*, 115 F.2d 552 (1940). It necessarily follows that the doctrine of res judicata or collateral estoppel would not apply.

The Honorable United States Court of Appeals, Fifth Circuit, apparently would not consider the Court of Claims' Order (App. 8) barred Petitioner from making any claim under *original Section 415 or amendatory Section 415*, therefore, Petitioner submits: *he cannot be barred from both*, or *he would not be entitled to receive any retirement pay at all.* Any partial construction of the Court of Claims' Order, without construing the entire force and effect of the entire order, as applied to the facts of Petitioner's case, prejudices Petitioner's rights and renders any such partial construction void and illegal as violative of Petitioner's right to due process of law and procedural due process of law as guaranteed under the Constitution of the United States.

The Courts have no power to consider in isolation and to annul an act of Congress on the grounds that it is unconstitutional, but may consider that question only when the justification for some "direct injury" suffered or threatened, presenting a justiciable issue, is made to rest on such act, "direct injury" in its legal sense meaning a wrong which directly results in the violation of a legal right. *Alabama Power Co., v. Ickes*, 1938, 95 F.2d 364, 68 App. D.C. 235. ARTICLE 3, Section 2 of the United States Constitution and decisions thereunder. *Jeffrey*

Mfg. Co. v. Blagg, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364. Petitioner respectfully submits that his plea to this Honorable Court lies within the aforementioned requirement of the supreme law of this land.

Statutes cannot be declared void because they embody retroactive features, but where they do embody retroactive features and at the same time violate some provision of the United States Constitution, they can be declared void. *Bateman v. Ford Motor Co.*, D.C. Mich. 1948, 76 F.Supp. 178, Certiorari denied 69 S.Ct. 405 (2 mems), 335 U.S. 902, 93 L.Ed. 436. And herein lies the crux of Petitioner's case: he was confined to a military hospital on October 10, 1949. The Career Compensation Act of 1949 was signed into law on October 12, 1949 at which time Petitioner was qualified, under Section 415 thereof, to make his claim, but before he was discharged from the hospital, along came amendatory Section 415 to the 1949 Act stating "Any member who, on October 1, 1949, was a hospital patient . . ." ". . . may elect to receive retirement benefits computed under the laws in effect on September 30, 1949." *Amendatory Section 415 was made to apply retroactively*, and by so doing, it discriminated against Petitioner; deprived him of his Constitutional right to equal protection under the law and his property without due process of law, in violation of Amendments 5 and 14 and Article One, Section Nine of the United States Constitution. See also: *Hadlich v. American Mail Line*, 82 F. Supp. 562 (1949). The Courts have heretofore construed Petitioner's rights, under the Career Compensation Act of 1949, without first determining, *as requested by him*, the constitutionality of amendatory Section 415, especially when the applied effect of this Section, together with its provisions changing the Original Act, makes its

unconstitutionality most apparent. Amendments are to be construed together with the original act to which they are related as constituting one law, but by the application of amendatory Section 415 to the original act made this impossible hence its unconstitutionality. *McGee v. Baxter*, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1410. A court may not adopt a strained and illogical construction at variance with the plain meaning of an act to uphold its constitutionality, but if its unconstitutional purpose is clear, the act must fall. *U.S. v. Appalachian Electric Power Co.*, D.C. Va. 1938, 23 F. Supp. 83, Affirmed 107 F.2d 769, reversed on other grounds, 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied, 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143, Petition denied, 63 S.Ct. 67, 317 U.S. 594, 87 L.Ed. 487. It therefore follows that an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed. *U.S. v. C.O. Mason, Inc.*, 1964, 51 CCPA 107, Certiorari denied 85 S.Ct. 718, 379 U.S. 999, 13 L.Ed.2d 701. And so it is with amendatory Section 415.

CONCLUSION

The United States Constitution stands as a mighty shield against any invasion of individual rights conferred thereunder, and this includes equal protection of the law, prohibition against Ex Post Facto Laws, and deprivation of property, without due process of law; last, but not least, the essentials of due process of law and the right to due process of law. Anything less would be tyranny.

Under the rule that the courts and not Congress are the final authorities on constitutional validity, Congress cannot make valid that which conflicts with the Constitution, and cannot command enforcement of that which is, by hypothesis not the law of the United States. *Brown v. W.T. Grant Co.*, D.C. N.Y. 1943, 53 F. Supp. 182.

Petitioner respectfully prays that this Honorable Court will grant this writ to the United States Court of Appeals for the Fifth Circuit so the great wrong Petitioner has suffered will, at last, be remedied.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished to the Solicitor General, Department of Justice, Washington, D.C. 20530, the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana, 70130, and Robert W. Rust, Esq., United States Attorney, Room 300, Ainsley Building, Miami, Dade County, Florida, this 21 day of April, 1975.

All parties are hereby put on notice that 28 U.S.C. Section 2403, may be applicable hereto and that Petitioner does not know whether or not any Court, pursuant to the aforesaid Section 2403, has certified to the Attorney General the fact that the constitutionality of amendatory Section 415 to the Career Compensation Act of 1949 (64 Stat. 158, 37 USCA 285) has been drawn in question.

Petitioner further certifies that all parties required to be served with this Petition have been served.

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APPENDIX

APPENDIX

United States Court of Appeals, Fifth Circuit.

No. 74-2589
Summary Calendar.*

*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir. 1970, 431 F.2d 409, Part I.

JULIAN CARR,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Jan. 24, 1975.

Claim for additional retirement disability pay by former member of Air Force who retired in 1950 with a disability rating of 30 percent. The United States District Court for the Southern District of Florida, Joe Eaton, J., denied the petition, and claimant appealed. The Court of Appeals, Gewin, Circuit Judge, held that where the claimant sought monetary damages for the Government's refusal to award a higher rate of retirement pay, which was the same relief, arising from the same facts, denied to the claimant in an earlier Court of Claims action, the district court action was barred by res judicata, notwithstanding fact that claimant relied on the alleged unconstitutionality of an amendment to the Career Compensation Act of 1949, a theory which was not raised in the Court of Claims.

Affirmed.

1. Judgment—713(2), 720

Doctrine of res judicata makes final valid judgment conclusive on parties as to all matters of fact and law that were or should have been adjudicated in proceeding.

2. Judgment—585(1)

Conclusiveness of res judicata depends, inter alia, upon whether second suit is based upon same cause of action as prior proceeding.

3. Judgment—588

Where Court of Claims denied retired air force member's claim for monetary damages for Government's refusal to award higher rate of retirement pay, subsequent action in district court for same type of relief based on same facts was barred by res judicata and collateral estoppel, notwithstanding fact that claimant raised issue of unconstitutionality of amendment to Career Compensation Act of 1949 for first time in district court. Career Compensation Act of 1949, § 415, 63 Stat. 802 as amended; 28 U.S.C.A. § 1491.

4. Judgment—540, 634

While "res judicata" bars relitigation of same cause of action, "collateral estoppel" bars relitigation of same facts or issues that were necessarily determined in prior proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

GEWIN, Circuit Judge:

While on active duty with the United States Air Force, appellant was hospitalized on October 10, 1949 for a liver ailment. The disease eventually led to his retirement from the armed services on June 30, 1950, with a disability rating of thirty percent. He has received retirement pay equal to thirty percent of his base pay since that date, pursuant to the Career Compensation Act of 1949, ch. 681, 63 Stat. 802.

In 1965 appellant petitioned the Court of Claims for a determination that amended § 415[1] of the Act had deprived him of a vested right to remuneration at seventy-five percent of base pay under original § 415.[2] He argued that Congress, by deleting certain phrases from the origi-

[1]Any member who, on October 1, 1949, was a hospital patient and who, prior to January 1, 1951, is retired as a result of a physical disability growing out of the injury or disease for which he was hospitalized, may elect to receive retirement benefits computed under the laws in effect on September 30, 1949.

Ch. 175, 64 Stat. 158.

[2]Any member who, on the effective date of this Act, is a hospital patient and who within six months of the effective date of this Act is retired as a result of a physical disability growing out of the injury or disease for which he was hospitalized as of the date of enactment of this Act, may elect to receive retirement benefits computed under the laws in effect on the date preceding the date of enactment of this Act.

Ch. 681, § 415, 63 Stat. 825.

nal version,[3] had unlawfully removed him from the category of persons entitled to receive benefits computed on the basis of laws in effect prior to the Compensation Act. The Court of Claims, however, disagreed with his underlying assumptions. Upon consideration of written and oral arguments, the court held that appellant was not covered by either original § 415 or its amended counterpart. Hence, he was not entitled to increased retirement benefits.[4]

He brought this action several years later seeking a declaration that amended § 415 is unconstitutional. His prayer for relief before the district court, however, requested damages equalling the difference between seventy-five percent and thirty percent of base pay. Thus, the ultimate relief sought before both the Court of Claims and the United States District Court was identical. The district court denied the petition on res judicata grounds.

Appellant now maintains that no court has ever decided the constitutionality of amended § 415, and that he should be given the opportunity to prove that it violates his rights to equal protection and due process of law. While appellant is perfectly correct in his first assertion that no judicial body has ruled on the amendment's constitutionality, the propriety of his second contention does not inexorably follow.

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[3]As notes 1 and 2 demonstrate, Congress amended the provision by replacing "effective date" and "date of enactment" with the single date "October 1, 1949."

[4]Although the Court of Claims summary order does not explicitly state the grounds for its conclusion, it was apparently based on the fact that effective date was defined in the original act as October 1, 1949. See § 533(a), 63 Stat. 841 (App. 9). Since appellant was not hospitalized on October 1, he did not fall within the purview of the original § 415 nor, as he concedes, within the amendatory provision.

[1] The doctrine of res judicata makes a final valid judgment conclusive on the parties as to all matters of fact and law that were or should have been adjudicated in the proceeding. 1B Moore's Federal Practice § 0.405(1) (2d ed. 1948). The rule "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." Heiser v. Woodruff, 327 U.S. 726, 733, 66 S.Ct. 853, 856, 90 L.Ed. 970, 976 (1946).

[2-4] Constitutional question may be raised before the Court of Claims, 28 U.S.C. § 1491, so appellant had an opportunity to litigate the issue before that tribunal. The conclusiveness of res judicata, however, also depends upon whether the second suit is based upon the same "cause of action" as the prior proceeding. Acree v. Air Line Pilots Association, 390 F.2d 199 (5th Cir. 1968); Wilson Cypress Co. v. Atlantic Coast Line Railroad Co., 109 F.2d 623 (5th Cir. 1940). Here the appellant demands the same type of relief he sought before the Court of Claims: monetary damages. The acts complained of—the government's refusal to award a higher rate of retirement pay—are identical. No material facts have been alleged that were absent from the Court of Claims' deliberations. In essence, the only difference is appellant's theory of recovery. See Norman Tobacco and Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Williamson v. Columbia Gas and Electric Corp., 186 F.2d 464 (3d Cir. 1950). Since the primary right and the alleged wrong are the same in each action, Carr's present claim

is barred by res judicata.[5] Wasoff v. American Automobile Insurance Co., 451 F.2d 767 (5th Cir. 1971).

The judgment of the trial court is affirmed.

[5]We note, parenthetically, that if Carr's second suit had not presented the same cause of action, his claim would nonetheless be barred by collateral estoppel. While res judicata bars relitigation of the same cause of action, collateral estoppel bars relitigation of the same facts or issues that were necessarily determined in the prior proceeding. 1B Moore's Federal Practice, §§ 0.405 and 0.441(2) (2d ed. 1948). In Carr's previous suit the Court of Claims squarely held that he did not meet the prerequisites of original § 415. Any award of seventy-five percent base pay in the present litigation would necessarily rest on the opposite conclusion, i. e. that Carr did fit within the earlier provision. This we could not do, because the Court of Claims decision settled that issue. Thus, even applying principles of collateral estoppel, an adjudication of the constitutionality of the amendment is unnecessary and should be avoided. See Ashwander v. TVA, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688, 711 (1936) (Brandeis, J., dissenting in part); Texas v. Grundstrom, 404 F.2d 644 (5th Cir. 1968).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2589

JULIAN CARR,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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[Filed, Mar. 6, 1975]

ON PETITION FOR REHEARING
(March 6, 1975)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

[70] IN THE UNITED STATES COURT OF CLAIMS

No. 142-64

JULIAN G. CARR

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's notice and plaintiff's cross-motion for summary judgment. Upon consideration thereof, together with the opposition thereto, oral argument of counsel, and the briefs of the parties, it is concluded that plaintiff's claim does not fall within either Section 415 of the original Career Compensation Act of 1949, or Section 415 of the Act as amended, and plaintiff is therefore not entitled to recover and,

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiff's cross-motion for summary judgment is denied and plaintiff's petition is dismissed.

BY THE COURT
Wilson Cowan
Chief Judge

JUN 18 1965

[93] IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1965

No. 1042

JULIAN G. CARR, petitioner
v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner, while on active duty with the United States Air Force, was hospitalized on October 10, 1949, and found to be suffering from a liver disease. The condition led to his retirement from the service on June 30, 1950, with a disability rating of 30 percent and, as provided for in the Career Compensation Act of 1949, 63 Stat. 802, with retirement pay equal to 30 percent of his base pay (Pet. 4). He brought this action in the Court of Claims, asserting that the Compensation Act gives him the right to elect to have his disability retirement pay computed on the basis of laws in effect prior to its enactment and that, therefore, he is entitled to receive retirement pay equal to 75 percent of his base pay.

2. On the basis of these uncontested facts, the Court of Claims ruled that petitioner—who was not a hospital patient on October 1, 1949—has no right of election, under

Section 415, either as originally enacted or as amended in 1950.[2] Since the only issue presented is the narrow one of the effective date of the Career Compensation Act, a matter of little prospective application or importance, and because the decision of the Court of Claims is plainly correct, there is no occasion for review by this Court.

a. Petitioner is not eligible to elect under Section 415 because he was not, as that section required him to be, a hospital patient on the effective date of the Act, October 1, 1949. That this is the relevant date for the section, both as originally enacted and as amended, cannot reasonably be disputed.[3] Congress specified in the Act itself that, except for two sections not here relevant, the Act "shall be effective on October 1, 1949." See Section 533(a), supra, n. 1. This is to be contrasted with Congress' specification that the effective date of one of the excepted sections was to be "the date of enactment of this Act." See Section 533(b), 63 Stat. 841. Thus Congress was aware that "the date of enactment" might be other than October 1. It is significant that the provision here relied upon by petitioner, Section 415, was inserted into the statute after the dichotomy between the "effective date"—i.e., October 1—and the "date [95] of enactment" had been made clear in the bill and in the legislative reports.[4] The provision's

[2]As the petition does not contain the court's decision, we have reproduced it as an appendix to this memorandum.

[3]Indeed, in the Section as amended, the date of October 1, 1949, is specifically stated. See 64 Stat. 158, supra.

[4]Section 415 was a last minute amendment made on the floor of the Senate on September 26, 1949. See 95 Cong. Rec. 13259 (1949). The House and Senate Reports, both mentioning an effective date of October 1, 1949, and an unspecified "date of enactment" (see S. Rep. No. 733, 81st Cong., 1st Sess. 37 (1949); H. Rep. No. 779, 81st Cong., 1st Sess. 45 (1949)), had already been filed.

sponsor, Senator Butler, was undoubtedly aware of this differentiation, and he carefully maintained it, referring to the "date of enactment" in some places but clearly specifying that, in order to be entitled to elect retirement benefits under the old laws, a serviceman had to be a hospital patient "on the effective date."

b. Petitioner argues, however, that with the enactment of the Compensation Act on October 12, 1949—on which date he was a hospital patient—certain rights provided under the laws replaced by the new legislation were "saved" and became "vested" (Pet. 9-10). He places particular reliance on Section 520, 63 Stat. 834, which provides:

> Any provision of law which, on the date of enactment of this Act, entitles any person to be retired, to receive pay, retired pay, retirement pay, or retainer pay, or other monetary benefit, and which is directly repealed, impliedly repealed, or amended by the provisions of this Act, shall, if the entitlement of such person to such retirement, pay, retired pay, retirement pay, retainer pay, or other monetary benefit is saved by the provisions of this Act, be continued in full force and effect for [96] such entitlement and for such a time as such entitlement may exist.

It is apparent, however, that Section 520 saved provisions of the old law only for those whose entitlement thereto was preserved under the new law. As we have shown, petitioner's entitlement was not so preserved.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

March 1966.

* * *

[110]

[TITLE OMITTED]

FINAL JUDGMENT

(Filed April 25, 1974)

THIS ACTION came on for hearing before Court on defendant's motion for summary judgment, and the issues having been duly heard and a decision having been duly rendered, it is

ORDERED and ADJUDGED that plaintiff, Julian G. Carr, take nothing by his suit and that the action be dismissed on the merits, and that the defendant, United States of America, go hence without day and recover its costs of this action, said costs to be assessed by the Clerk of this Court upon appropriate notice.

DONE AND ORDERED at Miami, in the Southern District of Florida this 25 day of April, 1974.

/s/ Joe Eaton

UNITED STATES DISTRICT JUDGE

[111]

[TITLE OMITTED]

(Filed April 25, 1974)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on before the Court on April 15, 1974 for hearing on defendant's motion for summary judgment. Defendant contends that plaintiff's present action is barred by res judicata because plaintiff previously presented the same claim against the United States in the Court of Claims and was denied relief.

In the present action, plaintiff seeks a determination that he is entitled to greater disability retirement benefits under the Career Compensation Act of 1949, ch. 681, 63 Stat. 802, than he has been receiving since his retirement from the United States Air Force on June 30, 1950. Specifically, plaintiff's action involves § 415 of the 1949 Act (ch. 681, § 415, 63 Stat. 825) and the May 10, 1950 amendment of § 415 (ch. 175, 64 Stat. 158). The original § 415 allowed persons who came within its provisions to elect to have their retirement benefits computed under the law in effect prior to the 1949 Act. Amended § 415 changed the language of the original § 415, but it also permits the election to have retirement benefits computed under the law in effect prior to the 1949 Act.

Plaintiff seeks a judgment declaring amended § 415 to be unconstitutional. It is alleged that amended § 415 has deprived plaintiff of vested property rights under the 1949 Act without due process of law. The complaint prays

for recovery of the difference between the amount of disability retirement benefits plaintiff has been receiving from the date of his retirement (payments equal to 30% of plaintiff's base pay prior to retirement) and the amount of disability retirement benefits plaintiff alleges that he was actually [112] entitled to receive (payments equal to 75% of base pay). Plaintiff's counsel stated at the April 15, 1974 hearing that once amended § 415 is declared unconstitutional and struck down, plaintiff's entitlement to disability retirement benefits equal to 75% of base pay is established because plaintiff comes within the provisions of the original § 415.

It is alleged in plaintiff's complaint that in 1964 plaintiff filed an action in the Court of Claims seeking a determination that he was entitled to receive disability retirement benefits equal to 75% of base pay. The complaint alleges that although the Court of Claims denied plaintiff's claim, it did not fully determine his status under the 1949 Act because the Court merely interpreted the 1949 Act without first determining the constitutionality of amended §415.

Through discovery, defendant has obtained from plaintiff a copy of the record of the proceedings in the Court of Claims. In the petition which was filed in the Court of Claims, plaintiff alleged that he qualified under original § 415, and therefore, was entitled to receive disability retirement benefit equal to 75% of base pay. It was alleged that the enactment of amended § 415 resulted in a retroactive denial of plaintiff's "saved" entitlement under original § 415. Plaintiff alleged that he had been damaged in the amount of the difference between the 30% of base pay which he was receiving and 75% of base pay

which he alleged he was entitled to receive. Plaintiff sought an interpretation of the 1949 Act with reference to the denial of his "saved" right by amended § 415, and prayed for a determination of his rights under the 1949 Act.

On June 18, 1965, the Court of Claims ruled that a plaintiff's claim did not fall within either original § 415 or amended § 415. The Court granted the United States' motion for summary judgment, denied plaintiff's motion for summary judgment, and dismissed plaintiff's petition. Subsequently, the United States Supreme Court denied certiorari.

A common thread runs between the case at hand and the case plaintiff filed in the Court of Claims. In both cases, [113] plaintiff has premised his right to receive disability retirement benefits equal to 75% of base pay upon the contention that he comes within the provisions of the original § 415. The Court of Claims was called to rule upon that question and it ruled that plaintiff did not come within the provisions of the original § 415. That ruling is res judicata in the case at hand.

Regardless of the fact that the Court of Claims did not rule upon the constitutionality of amended § 415 plaintiff's present action is barred by res judicata. Even if plaintiff could prevail on his challenge to the constitutionality of amended § 415, he cannot ultimately prevail in this action because of the res judicata effect of the Court of Claims' ruling that plaintiff does not come within the original § 415.

It is therefore

ORDERED and ADJUDGED that the defendant's motion for summary judgment is GRANTED.

DONE and ORDERED at Miami, in the Southern District of Florida this 25 day of April, 1974.

/s/ Joe Eaton

UNITED STATES DISTRICT JUDGE

cc: United States Attorney
James A. Bacus, Esq.